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No. 94-23

In the
Supreme Court of the United States
October Term, 1994

CITY OF EDMONDS,
Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL,
et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

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OF THE PETITION FOR WRIT OF CERTIORARI**

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for petitioner and by counsel for respondent United States. Said letters of consent have been lodged with the Clerk of this Court. Counsel for respondents Washington State Building Code Council and

Oxford House, Inc., have withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of individual rights and government accountability will provide an additional viewpoint with respect to the constitutional and statutory issues presented. PLF has participated in numerous cases involving local zoning and land use regulations: *Dolan v. City of Tigard*, 512 U.S. ___, 62 U.S.L.W. 4576 (Jan. 21, 1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); cases that address the possible discriminatory effect of local ordinances, *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); and cases that address the balance between federal and local regulatory power, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991).

The opinion below holds that a local zoning ordinance that limits the number of nonfamily members who may reside in a dwelling zoned single-family residential is subject to the antidiscrimination provisions of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (FHA or the Act), and the Fair Housing Act Amendments (FHAA) of 1988. This result was reached despite the Edmonds' ordinance's qualification for exemption from FHAA mandates found at 42 U.S.C. § 3607(b)(1), which state that the FHAA will not "limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." This ruling is in direct contrast with an Eleventh Circuit ruling that held an almost identical zoning ordinance was exempt from this section of the FHAA. *See Elliott v. Athens*, 960 F.2d 975, 979-81 (11th Cir. 1992).

More troubling is the fact that the Ninth Circuit's decision significantly undermines local government's ability to enact land use regulations and represents an unwarranted and dangerous incursion of federal power into local governmental affairs. To the extent that land use and occupancy restrictions may be imposed by governmentally wielded police power, they ought to originate and be interpreted at the local level. This Court has long recognized that land use regulations and property law have traditionally been the province of state authority. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975).

By basing its ruling on the ordinance's failure to limit the number of family members as well as nonfamily members that can live together (*City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802, 807 (9th Cir. 1994)), the Court of Appeals in the instant case has stretched the bounds of statutory construction to the point of

absurdity in order to remove Edmonds' zoning ordinance from FHAA exemption. This placed Edmonds, and all other cities that have enacted similar ordinances, in the untenable position of having to redraft their maximum occupancy ordinances to limit the number of inhabitants to a specified ratio of persons per square foot of habitable floor area in a dwelling, without any reference to whether the inhabitants are related or not. Language referring to relatedness will remove an ordinance from the FHAA exemption, and a simple ceiling on the number of inhabitants in a dwelling may run afoul of the Due Process Clause of the Fourteenth Amendment. The remaining available scheme, if implemented, could substantially prejudice the City of Edmonds' efforts to accommodate the housing needs of large single families.

The alternative is to relinquish a large measure of local control over this quintessentially local determination to federal oversight. In short, the court below has unnecessarily intruded upon the local government's ability to establish reasonable occupancy limitations while yet preserving the ability of large families to live together.

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: August __, 1994.

Respectfully submitted,

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INTERESTS OF AMICUS CURIAE

The interest of amicus curiae is set forth in the
preceding motion and is adopted herein.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802 (9th Cir. 1994). The Ninth Circuit has created a clear and unavoidable split among Courts of Appeals with regard to the type of local zoning ordinances that are subject to the mandates of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (FHA or the Act), and the Fair Housing Act Amendments of 1988 (FHAA), which extended the Act's antidiscrimination provisions to the handicapped. 42 U.S.C. §§ 3604(f)(2), 3604(f)(3)(B), 3607(b)(1).

The court below ruled that a local zoning ordinance that limits the number of nonfamily members who may reside in a dwelling zoned single-family residential is subject to FHAA's antidiscrimination provisions, notwithstanding the unambiguous exemption found at 42 U.S.C. § 3607(b)(1), which states that the FHAA will not "limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

This ruling is in direct contrast with an Eleventh Circuit ruling that held an almost identical zoning ordinance was exempt from this section of the FHAA. *See Elliott v. Athens*, 960 F.2d 975, 979-81 (11th Cir.), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 287 (1992). Expressly disagreeing with the Eleventh Circuit (*Edmonds*, 18 F.3d at 806), the Ninth Circuit has construed the FHAA exemption to include only those zoning ordinances that restrict "all occupants, whether related or not." *Id.* at 807.

STATEMENT OF THE CASE

Oxford House, Inc., sponsors halfway houses around the country for recovering alcoholics and drug addicts. Each house must have six or more residents in order to ensure financial self-sufficiency. The Oxford House in Edmonds, Washington, is a leased residence for 10 to 12 adult men. The house is situated in an area that is zoned single-family residential.

Edmonds issued criminal citations to the owner of the Oxford House for violating provisions of the Edmonds Community Development Code (ECDC) which provide that property zoned single-family residential may only be used for single-family dwelling units. ECDC § 16.20.010(A)(1). A single-family dwelling unit means a detached building used by one family, limited to one per lot. ECDC § 21.90.080. Under ECDC § 21.30.010, a family "means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage." Thus, group homes of more than five unrelated recovering alcoholics and drug addicts are effectively excluded from single-family residential zones in Edmonds.

Under the FHAA, it is unlawful to discriminate against any person because of a handicap. 42 U.S.C. § 3604(f)(2). The residents of the Oxford House are handicapped persons under the FHAA. 42 U.S.C. § 3602(h) (stating that a person participating in a supervised drug rehabilitation program, coupled with nonuse, meets the definition of handicapped). Where FHAA's provisions apply, a finding of discrimination may be based on "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person

equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Whether the City of Edmonds complied with the substantive requirements of the FHAA is not presently at issue.

However, certain regulations are exempt from FHAA's provisions. Under 42 U.S.C. § 3607(b)(1), FHAA's provisions do not apply to "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The parties to this case have stipulated to the fact that the zoning ordinance here at issue was not enacted out of any animus toward or intent to discriminate against the occupants of Oxford House because of their handicap.

Oxford House requested the City of Edmonds to make reasonable accommodations under Section 3604(f)(3)(B) by letting it continue operations in the single-family residential zone. The City of Edmonds declined and filed a declaratory relief action seeking a ruling that its single-family residential zoning provision was exempt from FHAA's provisions under Section 3607(b)(1).

The District Court held that the exemption applied, relying on the analysis provided in *Elliott v. Athens*, 960 F.2d 975, an Eleventh Circuit decision that likewise involved an attempt to establish a group recovery home in a dwelling zoned single-family residential. However, the Ninth Circuit disagreed with the *Elliott* court's analysis and held that the exemption did not apply and that the zoning ordinance was in violation of the FHAA. The Ninth Circuit's decision therefore creates a direct and irreconcilable split among circuits with regard to how FHAA's exemptions are to be interpreted.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(a) lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter. Supreme Court Rule 10.1(c) lists the circumstance when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Both of these grounds for review are present in this case.

I

THIS COURT SHOULD SETTLE THE SCOPE OF THE FHAA EXEMPTION'S APPLICABILITY TO SINGLE-FAMILY ZONING SCHEMES

- A. **The City of Edmonds' Single-Family Zoning Ordinance, Whose Structure Is Typical of Many Local Zoning Schemes, Is Exempt from the FHAA by the FHAA's Clear Language**
 - 1. **The Ordinance Restricts the Maximum Number of Individuals Permitted To Occupy a Dwelling**

The FHAA exempts some regulations from its purview, including reasonable local restrictions on the maximum number of occupants permitted to occupy a dwelling. 42 U.S.C. § 3607(b)(1). The City of Edmonds permits five or fewer unrelated persons or two or more persons related as

specified by ordinance to live in a single-family dwelling within its boundaries. ECDC § 21.30.010. The structure of the City's zoning code is common to the vast majority of cities in the State of Washington and many communities throughout the country. *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802. Although Edmonds' ordinance makes a distinction on the basis of the relatedness of the occupants of a single-family dwelling, the ordinance nevertheless restricts the maximum number of occupants who may occupy a dwelling and is therefore exempt from the FHAA according to the FHAA's plain language.

The distinction based on relatedness exists only to recognize the protection that the Due Process Clause of the Fourteenth Amendment extends to the family. The definition of relatedness in Edmonds' ordinance follows the form which this Court approved in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The ordinance expressly avoids limiting the number of members of a family in light of this Court's teaching in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which prohibits municipalities from forcing people to live in certain narrowly defined family patterns. The ordinance's constitutionally necessary accommodation of familial interests does not render its remaining language any less of a restriction on the maximum occupancy of a single-family dwelling.

2. The Ordinance Is Reasonable

The ordinance is a reasonable restriction on the maximum number of occupants who may occupy a dwelling. The City of Edmonds has an unquestionably legitimate interest in the tranquility of its single-family residential areas, see *City of Memphis v. Greene*, 451 U.S. 100, 127 (1981), and it may exercise its police powers "to lay out

zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.'" *Id.* at 790 n.43 (quoting *Village of Belle Terre v. Boraas*, 416 U.S. at 9). The ordinance controls population density, traffic, and noise in single-family residential areas while preserving the residential character of such areas. The ordinance also affects a category of people identified by their desire to live as a large group in a single-family residence. As applied in this case, the ordinance precludes unrelated groups of more than five recovering alcoholics and drug abusers from living in a single-family residential dwelling. The ordinance's burden on recovering alcoholics and drug abusers is not onerous and leaves them with alternatives: like all unrelated persons, they may live in groups of more than five in areas of Edmond's zoned for higher density residential habitation, or they may live in groups of five or less in single-family areas. In view of Edmonds' long-standing and legitimate interest in maintaining the character of single-family areas, the ordinance is reasonable, and as a restriction on the maximum number of people who may inhabit a dwelling, it is exempt from the FHAA.

B. The Ninth Circuit's Misinterpretation of the FHAA Exemption Extends the FHAA's Reach Beyond What Congress Intended

As concerns local land use laws, regulations, practices, and decisions, Congress intended the FHAA to prohibit discrimination against the handicapped in several manners in which it has traditionally occurred. H.R. REP. NO. 711, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2184-85 (H.R. REP. NO. 711). The first means of discriminatory treatment specifically prohibited is "the enactment or imposition of ... land-use requirements on congregate living arrangements among non-related persons with disabilities." *Id.* at 2185. The second

means is "the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of [handicapped] individuals to live in the residence of their choice in the community." *Id.* The third means is "the application or enforcement of otherwise neutral rules and regulations on ... land-use in a manner which discriminates against people with disabilities." *Id.* (footnote omitted).

Although the City of Edmonds' zoning ordinance is exempt from these requirements as discussed above, assuming arguendo that it is not, the ordinance still does not discriminate against people with disabilities in violation of the FHAA. On its face, the ordinance does not impose special requirements on disabled persons or on groups of disabled persons. In the application of the ordinance to Oxford House, any discrimination against disabled persons occurs not because of their disabilities as such, but rather because of their choice as unrelated persons to live as a group of more than five in a single-family residential area. Such treatment is not discrimination at all, for in this situation, the disabled are treated in precisely the same manner as any other unrelated persons, and this treatment does not result from "false or over-protective assumptions about the needs of handicapped people, [or from] unfounded fears of difficulties about the problems" that their presence would pose. *Id.* Indeed, there are no allegations that the City of Edmonds acted out of any animus against the occupants of Oxford House on the basis of their disability. *City of Edmonds v. Washington State Building Code Council*, 18 F.3d at 803.

C. The Ninth Circuit's Ruling Violates Congressional Intent To Avoid Federal Interference in Fundamental Local Land Use Decisions

The decision below held that the City of Edmonds' zoning ordinance is not exempt from the FHAA and must therefore meet the FHAA's requirements. The decision employed language which belittled the efforts of Edmonds and other cities to meet the requirements of the Due Process Clause in facially neutral zoning ordinances. Two consequences necessarily follow the Ninth Circuit's interpretation of the FHAA exemption.

Any city which wishes to avail itself of the exemption must amend its occupancy restrictions so that they are expressed in terms of a number of inhabitants per unit of habitable floor area in a dwelling. Any attempt to accommodate large single families will subject the zoning scheme to federal requirements.

Congress intended the FHAA to prohibit discrimination on the basis of handicap. H.R. REP. NO. 711 at 2184. Because this Court has recognized that the power of local governments to zone and control land use is broad, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), and that zoning laws are peculiarly within the province of state and local legislative authorities, *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975), the Ninth Circuit's interpretation of the FHAA is more invasive of the province of local government than is warranted to accomplish Congress' intent. Congress cannot have intended to require numerous cities to either rewrite their zoning ordinances or be subject to federal control on basic land use decisions because it included a straightforward exemption for such decisions in the FHAA.

**D. The Ninth Circuit's Ruling Requires
Discriminatory Treatment of the Disabled
Rather than the Nondiscrimination
Intended by the FHAA Exemption**

As a result of the Ninth Circuit's decision, disabled persons who wish to live as a group in a single-family residential area will receive preferential treatment with respect to local maximum occupancy ordinances that is unwarranted by Congress' admittedly legitimate desire to prevent discrimination based on handicap. A city will have to honor the wishes of group homes such as Oxford House in accordance with federal law, notwithstanding the availability of multiple-family residential areas and in spite of the inability of nondisabled persons to live as groups in single-family areas or face litigation over the reasonableness of the accommodations made in applicable rules or policies.

As discussed above, the disabled are not experiencing discrimination because of their disabilities, but rather because of their desire to live in a high density arrangement in a low density neighborhood. Edmonds' ordinance treats all unrelated groups evenhandedly, and the FHAA will protect the disabled from any discrimination they may encounter when they choose to live in smaller groups in low density neighborhoods. In short, the Ninth Circuit's interpretation below of the FHAA exceeds the nondiscriminatory treatment of the disabled which Congress intended.

II

**DECISIONS BY SOME UNITED STATES
COURTS OF APPEALS CONFLICT ON THE
QUESTION OF WHETHER THE FHAA
EXEMPTS TRADITIONAL AND
PREVALENT SINGLE-FAMILY ZONING
SCHEMES FROM ITS COVERAGE**

Some United States Courts of Appeals have rendered conflicting decisions on the question of whether 42 U.S.C. § 3607(b)(1) exempts a group of similar single-family zoning ordinances. The Eleventh Circuit, in its decision in *Elliott v. City of Athens*, 960 F.2d at 984, found traditional single-family zoning to be a type of occupancy restriction exempt from FHAA coverage. The Eighth Circuit affirmed the ability of local communities to apply zoning controls in the form of distancing requirements for group homes, despite a resulting restriction on the housing choices of the disabled. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). *See also Doe v. City of Butler*, 892 F.2d 315, 321 (3d Cir. 1989) (applying similar reasoning to uphold a zoning ordinance limiting the residency of unrelated adults when applied to a shelter for battered women). The decision of the Ninth Circuit in this case explicitly rejects the reasoning of the Eleventh Circuit, and it also conflicts with the position of the Eighth Circuit of the United States Court of Appeals as well.

CONCLUSION

By ruling that the FHAA exemption for reasonable maximum occupancy restrictions does not apply to the City of Edmond's zoning ordinance, the Ninth Circuit misinterprets Congress' intent behind the exemption. It thereby leaves many local governments with the choice of either redrafting their zoning laws or having the federal government unduly intrude into their land use decisions. Moreover, the Ninth Circuit grants a preference to the disabled that permits them to live as large groups in single-family residential neighborhoods, which is a right that no other unrelated group of people enjoys. The Ninth Circuit's decision also conflicts with an Eleventh Circuit decision on a virtually identical zoning ordinance, and it is inconsistent with a decision in the Eighth Circuit.

To resolve this conflict and to give effect to the FHAA exemption as Congress intended, Pacific Legal Foundation respectfully submits that this Court should grant the petition for writ of certiorari.

DATED: August, 1994.

Respectfully submitted,

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